

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Revision of Rules and Policies
for the Direct Broadcast
Satellite Service

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IB Docket No. 95-168
PP Docket No. 93-253

To: The Commission

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REPLY COMMENTS OF VIACOM INC.

VIACOM INC.

Michael Fricklas
Senior Vice President,
Deputy General Counsel
Viacom Inc.
1515 Broadway
New York, NY 10036

November 30, 1995

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REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") hereby submits its reply to comments filed in response to the above-referenced Notice of Proposed Rulemaking ("NPRM") relating to the rules and policies governing direct broadcast satellite ("DBS") service. As described more fully below, Viacom urges the Commission to reject attempts to extend the scope of the program access rules beyond their statutory and policy foundation or to otherwise revisit program access implementation issues that have already been thoroughly considered and decided. Further, the record overwhelmingly supports the Commission's proposal to promote competition among DBS operators by limiting the aggregation of DBS channel assignments to a total of 32 at any combination of the orbital locations capable of full-CONUS service. Finally, Viacom urges the Commission to safeguard against the harm to programmers and ultimately consumers that could result from anticompetitive exploitation of bottlenecks in DBS distribution of digital video programming to cable

operators and other multichannel video programming distributors ("MVPDs").

I. The Commission Should Reject Calls to Extend the Scope of the Program Access Rules or to Revisit Issues Already Thoroughly Considered and Decided

Most commenters agree that there is no need to adopt additional rules at this time to ensure that DBS operators are able to obtain adequate access to programming.¹ Rather, these commenters agree that the existing program access rules are sufficient to address any such concerns that may arise. Indeed, the comments demonstrate that DBS operators currently provide to consumers virtually all of the satellite-delivered program services available through cable operators. Moreover, the record developed in other proceedings, as well as the relative handful of complaints that have been filed asserting violations of the program access rules, provide further indications that no changes to the rules are needed.

A. There is No Basis for Extending the Scope of the Program Access Rules Either to Programmers in Which Non-Cable MVPDs Have an Attributable Interest or to Non-Vertically Integrated Programmers

A few commenters urge the Commission to extend the scope of the program access rules wholly beyond their statutory and

¹ See, e.g., Comments of Continental Cablevision, Inc. at 16-19; Comments of Cox Enterprises, Inc. at 8-11; Comments of MCI Telecommunications Corporation at 19; and Comments of the National Cable Television Association, Inc. at 11-13.

policy basis. These isolated commenters seek not only to extend the program access rules to DBS operators generally, but to cover programmers that are not vertically integrated with any MVPD.² Not only have these commenters failed to provide any basis for extending the rules in such a manner, but their calls to bring non-vertically integrated programmers within the ambit of the program access rules is far beyond the scope of the present proceeding and the Commission's authority. In any event, far from promoting competition, extension of the rules would serve only to remove incentives to invest in new and innovative program services.

As Viacom has demonstrated in other proceedings, the entire premise underlying the program access rules was to constrain the perceived market power of cable operators.³ The program access rules were not intended to regulate programmers per se, but rather were specifically designed by Congress as a limited intrusion into the programming marketplace to ensure that cable operators do not exploit their ownership of program services to impede the development of competing MVPDs. At the same time, the provisions of the

² See, e.g., Comments of Echostar Satellite Corporation and Directsat Corporation (hereinafter "Echostar/Directsat") at 48-51; and Comments of BellSouth Corporation at 9.

³ See, e.g., Reply Comments of Viacom Inc., CS Docket No. 95-61 (filed July 28, 1995) at 2-4.

1992 Cable Act reflect the finding of Congress that a program service unaffiliated with cable operators has neither the incentive nor ability to favor one form of distribution technology over another or to impede the development of competition in the video distribution business. Rather, such programmers can only be helped by robust competition in the video distribution business. Accordingly, there is no need -- and certainly no FCC authority -- to extend the reach of the program access rules to either non-vertically integrated programmers or to programmers affiliated with non-cable MVPDs.

B. The Commission Should Reject Calls to Revisit
 Issues Previously Decided After Extensive
 Proceedings

The National Rural Telecommunications Cooperative ("NRTC") uses this proceeding to once again ask the Commission generally to revisit certain program access implementation issues only recently decided after extensive rulemaking proceedings and exhaustive deliberations on reconsideration. Despite these definitive rulings, NRTC once again asks the Commission to reverse its prior findings that (i) there is no need to award damages in the event a programmer is found to have violated the program access rules and (ii) the 1992 Cable Act does not preclude vertically integrated programmers from entering into exclusive

distribution arrangements with non-cable MVPDs.⁴

Notwithstanding the fact that the Commission has repeatedly rejected NRTC's position on these issues, NRTC raises not a shred of new evidence in calling for the Commission to revisit its prior decisions.

Viacom submits that the Commission should again reject NRTC's request and confirm that there is no basis for changing its conclusions that (i) the remedy of damages is not necessary because "the sanctions available . . . , together with the program access complaint process, are sufficient to deter entities from violating the program access rules"⁵ and (ii) exclusive distribution arrangements between vertically integrated programmers and non-cable MVPDs can be pro-competitive and should not be flatly prohibited.⁶ Both decisions were made only after a careful consideration of voluminous filings and NRTC has provided absolutely no basis for the Commission to alter its reasoned decisions on these issues.

⁴ Comments of NRTC at 5-9.

⁵ Video Programming Distribution and Carriage (Reconsideration), 76 RR 2d 1085, 1091 (1994).

⁶ Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265, FCC 94-326 (rel. Dec. 23, 1994) at ¶¶ 39, 42.

II. The Record Provides Overwhelming Support for the Commission's Proposal to Spur Competition Among DBS Operators by Limiting the Aggregation of DBS Channel Assignments

The record provides overwhelming support for the Commission's tentative conclusion to promote competition within DBS by limiting the aggregation of DBS channel assignments to a total of 32 at any combination of the orbital locations capable of full-CONUS service. As Viacom and others demonstrated in their comments, such a limitation would allow DBS both to emerge as an effective competitor to other sources of multichannel video programming and to promote competition among DBS operators.⁷

Not surprisingly, the commenter most vociferously urging the Commission to reject its tentative conclusion to limit the aggregation of DBS channel capacity in order to promote competition within DBS is DIRECTV.⁸ DIRECTV, of course, is one of two high-power DBS operators currently offering service, using its 27 DBS channels to provide consumers with more than 150 different programming options.

⁷ See, e.g., Comments of Viacom Inc. at 4; Comments of BellSouth Corporation at 3; Comments of Cox Enterprises, Inc. at 5; and Comments of MCI Telecommunications Corporation at 12-14.

⁸ Comments of DIRECTV at 6-11. Echostar/Directsat, while opposing the institution of a firm 32-channel limit, would instead have the Commission institute a case-by-case review of DBS combinations. See Comments of Echostar/Directsat at 42-43.

In calling for the Commission to reverse its tentative conclusion to limit the aggregation of DBS channels, DIRECTV essentially argues against promoting competition among DBS operators. The basis for DIRECTV's argument appears to be the view that competition within DBS is neither essential nor a legitimate goal to be promoted by the Commission. Rather, DIRECTV submits, the emergence of a single DBS operator (or at least a single dominant DBS operator) is needed to compete effectively with incumbent cable operators. DIRECTV's arguments against imposition of the aggregation limits must be acknowledged for what they are -- an attempt to preserve its position as the dominant provider of DBS service. These arguments should be rejected out of hand.

In sum, Viacom and the vast majority of commenters urge the Commission to adhere to its tentative conclusion to adopt a 32-channel aggregation limit. Such a rule will serve to promote competition among DBS operators while still enabling those operators to compete effectively with cable operators and other MVPDs.

III. The Commission Must Act to Prevent the Emergence of Bottlenecks in the Distribution of Video Programming

The record also demonstrates that other commenters, including the United States Department of Justice, share Viacom's concern that the emergence of a bottleneck in the distribution of video programming could ultimately result in

diminished programming choices for consumers.⁹ In its comments, Viacom demonstrated the potential anticompetitive results that could flow from the emergence of proprietary DBS technology as the dominant means of delivering digital program services to cable operators and other MVPDs.¹⁰ Based on the record developed here and in other proceedings, Viacom once again urges the Commission to ensure that programmers are able to benefit from increased competition in the video distribution marketplace by ensuring a transmission path to consumers free of artificial barriers for programmers.

IV. Conclusion

Based on the foregoing, Viacom submits the following:

- There is no basis for extending the program access rules either to programmers in which a non-cable MVPD has an attributable interest or to non-vertically integrated programmers. Such an extension -- a result never intended by Congress -- would go far beyond the policy basis underlying the program access rules of ensuring that cable operators are not able to use their perceived market power to impede competition from other MVPDs.
- The record provides overwhelming support for the Commission's desire to promote competition among DBS operators by imposing a 32-channel limit on the aggregation of DBS channel assignments.

⁹ See Comments of the United States Department of Justice at 15.

¹⁰ Comments of Viacom at 6-8.

- The Commission should ensure that programmers and consumers are not harmed by anticompetitive exploitation of bottlenecks in DBS distribution of digital video programming to cable operators and other MVDPs.

Respectfully submitted,

VIACOM INC.

By:



Michael Fricklas
Senior Vice President,
Deputy General Counsel
Viacom Inc.
1515 Broadway
New York, NY 10036

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